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**IN THE
COURT OF APPEALS OF INDIANA**

ALFRED MCGINNIS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 18A02-0609-CR-801
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0401-FC-1

August 8, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Alfred McGinnis (“McGinnis”) appeals his conviction for Class C felony operating a vehicle after a lifetime suspension. He raises several issues, one of which we find dispositive: whether the trial court abused its discretion in denying his request for a public defender. Concluding that the trial court violated McGinnis’s due process rights by failing to appoint a public defender for him, we reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

On October 20, 2003, Indiana State Trooper Michael Wylie (“Trooper Wylie”) noticed a vehicle traveling on Interstate 69 below the speed limit. He made a “routine check” of the license plate and discovered that the vehicle was registered to McGinnis, who was classified as a habitual traffic offender. Trooper Wylie initiated a traffic stop and, after determining McGinnis’s identity, arrested him.

On January 30, 2004, the State charged McGinnis with Class C felony operating a vehicle after lifetime suspension. McGinnis appeared at the initial hearing on February 23, 2004, and requested a public defender. The trial court gave him an application to determine whether he was eligible for a public defender. On the application, McGinnis said he did not own real estate, he did not have any money or bank accounts, and that he was unemployed. Appellant’s App. pp. 13-14. Without holding a hearing and without issuing any findings, on February 24, 2004, the trial court denied McGinnis’s request with an order stating that McGinnis was “fully able to pay the cost of representation by counsel.” Id. at 15. On April 26, 2004, McGinnis renewed his request for a public defender, which the trial court summarily denied the same day. McGinnis once again

requested a public defender on May 5, 2004; his request was again summarily denied the same day.

McGinnis appeared before the court on May 25, 2004, for a pre-trial conference. At this conference, the following dialogue occurred:

Trial Court: Don't you think you ought to get you an attorney?

McGinnis: I can't afford one right now.

Trial Court: You better – well, can you afford to do eight years down in prison?

McGinnis: No, sir.

Trial Court: That's what you're looking at, isn't it? And you've had a lifetime suspension of your driving privileges because you're a habitual traffic violator. Now, you know, you put up a bond. You're going to need to do something. We're here to have a pre-trial. This thing is going to be set down for trial, and I'm telling you, if you don't get you an attorney your chances aren't good. You're going to lose.

Tr. pp. 16-17.

The trial court then gave McGinnis a written notice that his trial would take place on June 24, 2004. The trial was held on that date, and McGinnis did not appear. In fact, he was incarcerated at the Miami Correctional Facility on that date. The trial court held his trial in absentia, and McGinnis was convicted as charged.

On June 8, 2006, the trial court was informed that McGinnis had been incarcerated at the Miami Correctional Facility at the time of the trial. The trial court granted McGinnis's request for transport to the sentencing hearing, and the trial court appointed a public defender to represent McGinnis at sentencing. The sentencing hearing was held

on August 21, 2006, and the trial court sentenced McGinnis to four years executed. McGinnis now appeals. Additional facts will be provided as necessary.

Discussion and Decision

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel. Dobbins v. State, 721 N.E.2d 867, 871 (Ind. 1999). This right includes the right of an indigent defendant in a criminal prosecution to have counsel provided for him at the State's expense. Moore v. State, 273 Ind. 3, 7, 401 N.E.2d 676, 678 (1980). The court does not have discretion to deny counsel to an indigent defendant. Graves v. State, 503 N.E.2d 1258, 1262 (Ind. Ct. App. 1987). If the defendant "legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him." Moore, 273 Ind. at 7, 401 N.E.2d at 678. Failure to appoint counsel for an indigent defendant amounts to a denial of due process. Id.

The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on a thorough examination of the defendant's total financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations.

Id.

The record at hand is completely devoid of any such examination. There is nothing in the record to show a balancing of defendant's assets against his liabilities and a consideration of the amount of defendant's disposable income or other resources reasonably available to him. The State seems to argue that perhaps the trial court

considered the fact that McGinnis posted a bond of \$1005. However, “[t]he fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered.” Id. (citation omitted). Furthermore, we are not convinced by the State’s argument that McGinnis knowingly waived his right to have counsel present. It is quite clear that McGinnis did not want to proceed pro se, as he requested a public defender to be appointed to him on four separate occasions.

Since the trial court did not properly exercise its discretion in denying defendant court-appointed counsel, the judgment of the trial court must be reversed and the cause remanded for a new trial.

Reversed and remanded for proceedings consistent with this opinion.

DARDEN, J., and KIRSCH, J., concur.